

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
BATESVILLE DIVISION**

**IN RE: RICHARD BALMER AND
CONNIE BALMER**

**1:03-bk-19058 E
CHAPTER 7**

**ORDER GRANTING MOTION BY THE UNITED STATES TRUSTEE
TO DISMISS CASE AND FORBIDDING DEBTORS FROM FILING FOR
BANKRUPTCY FOR A PERIOD OF EIGHT (8) YEARS**

Now before the Court is the Motion to Dismiss Case with a Permanent Bar to Refiling (“**Motion to Dismiss**”), filed by the United States Trustee (“**U.S. Trustee**”) on August 4, 2003. A hearing was held on the Motion to Dismiss on September 11, 2003. James Hollis appeared for the U.S. Trustee. Pro se Debtors, Richard and Connie Balmer (“**Debtors**”), did not appear. This is a core proceeding under 28 U.S.C. § 157(b)(2), and the Court has jurisdiction to enter a final judgment in this case.¹

FACTS

Debtors have an extensive history of previous bankruptcy filings.² The following is a list of Debtors’ previous bankruptcy cases in chronological order:

<u>Case Number (Chapter)</u>	<u>Place/Date Filed</u>	<u>Disposition</u>
1. 94-30794 (Ch. 7)	N.D. Ind. - 04/20/94	Case closed 09/12/94, discharge granted.

¹ During the hearing on the U.S. Trustee’s Motion to Dismiss, the Court indicated that, based on the evidence before it, Debtors’ instant case would be dismissed by this subsequent Order.

² The Court takes judicial notice of all documents in Debtors’ current case and previously filed bankruptcy cases. *See* Fed.R.Evid. 201; *In re Henderson*, 197 B.R. 147, 156 (Bankr. N.D. Ala. 1996) (noting that court may take judicial notice of its own orders and of records in a case before the court, as well as of documents filed in another court) (citations omitted); *see also In re Penny*, 243 B.R. 720, 723 n.2 (Bankr. W.D. Ark. 2000).

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2. 95-32344 (Ch. 13)	N.D. Ind. - 10/12/95	Dismissed 06/17/96 upon motion of trustee.†
3. 96-32265 (Ch. 13)	N.D. Ind. - 08/08/96	Dismissed 01/29/97 upon motion of trustee.†
4. 97-31247 (Ch. 13)	N.D. Ind. - 04/09/97	Dismissed 09/05/97 upon motion of Debtors.
5. 98-10157 (Ch. 13)	E.D. Ark. - 04/29/98	Dismissed 06/11/98 for failure to make payments. ³
6. 98-10234 (Ch. 13)	E.D. Ark. - 06/17/98	Dismissed 03/03/99 upon motion of trustee for failure to make payments.
7. 99-10115 (Ch. 13)	E.D. Ark. - 03/11/99	Dismissed 09/09/99 upon motion of trustee for failure to make payments.
8. 99-10378 (Ch. 13)	E.D. Ark. - 09/16/99	Dismissed 01/12/00 for failure to attend two § 341(a) meetings of creditors.
9. 01-10167 (Ch. 13)	E.D. Ark. - 03/28/01	Dismissed with prejudice 10/12/01 upon motion of trustee for failure to make payments.
10. 03-12602 (Ch. 7)	E.D. Ark. - 03/04/03	Dismissed 06/24/03 for failure to timely pay filing fee.

This petition was filed under Chapter 7 of the Bankruptcy Code on July 30, 2003; it is Debtors' eleventh.

On the instant petition, Debtors list only one prior bankruptcy filing in the last six years. As is clear from the above-listed filings, the number of prior bankruptcy cases listed on Debtors' current petition is patently false. Debtors also failed to disclose the correct number of prior bankruptcy cases on their tenth petition.

Due to Debtors' failure to cure deficiencies in their current petition, an Order to Show Cause why their case should not be dismissed was entered on August 26, 2003. That Order stated that failure to object within 15 days from the date of entry would result in dismissal of Debtors' case; no party filed an objection within the 15-day period. Moreover, Debtors have not yet paid the filing fee in this case. A review of the evidence and Court's records also indicates that one of the Debtors, Mr. Balmer, signed as

³ Debtors also failed to attend § 341(a) meeting of creditors.

† The bases for these motions to dismiss were not stated in the records of these previous cases.

a bankruptcy petition preparer in the cases of Richard L. Balmer, Jr., case number 1:03-bk-12980, and Jamie L. Negelein, case number 1:03-bk-12978 (“**Negelein and Balmer, Jr.**”). The Negelein and Balmer, Jr. cases were pending simultaneously with Debtors’ tenth case, even though these two individuals were listed as dependents on Debtors’ schedules in Debtors’ tenth case.⁴ The dependants’ cases were both ultimately dismissed, Balmer Jr.’s for failure to correct deficiencies in his schedules and Negelein’s for failure to timely pay filing fees.

LAW AND ANALYSIS

In this Motion to Dismiss, the U.S. Trustee argues that the sheer number of cases filed by Debtors and their bases for dismissal demonstrate an abuse of the bankruptcy system and that Debtors’ conduct constitutes a pattern of abuse which warrants a dismissal of this case. The U.S. Trustee also argues that Debtors should be permanently barred from refileing under any chapter of the Bankruptcy Code, unless written permission is obtained from the Court.⁵

I. Dismissal of Debtors’ Case is Warranted “For Cause.”

Section 707(a)⁶ is the statutory provision which governs dismissals under Chapter 7 of the Bankruptcy Code. Section 707(a) provides:

⁴ Debtors’ current petition also lists Negelein (a.k.a. Jamie L. Balmer) and Balmer, Jr. as dependants.

⁵ Counsel for the U.S. Trustee also requested orally that Debtor, Mr. Balmer, be barred from preparing any further bankruptcy petitions on behalf of other individuals. However, since this request was not contained in the written Motion to Dismiss and Debtors were not present at this hearing, they would not have had notice of this request. Accordingly, it will be denied.

⁶ Unless otherwise noted, all code sections refer to the bankruptcy provisions contained in Title 11 of the U.S. Code.

- (a) The court may dismiss a case under [Chapter 7], only after notice and a hearing and only for cause, including—
- (1) unreasonable delay by the debtor that is prejudicial to creditors;
 - (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
 - (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

These three types of cause for dismissal are nonexclusive, *In re Huckfeldt*, 39 F.3d 829, 831 (8th Cir. 1994) (citations omitted), and are not applicable under the facts of this case.

The first issue presented in the case at bar is whether Debtors' actions constitute grounds to dismiss this case for cause for an unenumerated reason under § 707(a). The seminal case in the Eighth Circuit on dismissal for cause under § 707(a) is *In re Huckfeldt*. *In re Christiansen*, 251 B.R. 69, 71 (Bankr. W.D. Mo. 2000). In *Huckfeldt*, the Court of Appeals for the Eighth Circuit upheld the dismissal of a petition under Chapter 7 on the grounds that it was filed in bad faith to frustrate a divorce decree. *Huckfeldt*, 39 F.3d at 830. However the Eighth Circuit adopted a narrow, cautious approach to a finding of bad faith, citing with approval *In re Khan*, 172 B.R. 613 (Bankr. D. Minn. 1994). *Id.* at 832. “[T]he *Khan* court urged that bad faith under § 707(a) be limited to extreme misconduct falling outside the purview of more specific code provisions . . .” *Id.* (citing *Khan*, 172 B.R. at 624-26). The Eighth Circuit found *Khan*'s approach was consistent with that contained in 4 *Collier on Bankruptcy* ¶ 707.03, at 707—10-11 (15th Ed. 1992) which states, “[b]ad faith may be found when the debtor has a frivolous, noneconomic motive for filing a bankruptcy petition, when there is a sinister or unworthy purpose, or when there is an abuse of the judicial process.” *Huckfeldt*, 39 F.3d at 832 n.4.

Although upholding the dismissal, the Eighth Circuit reasoned that while some conduct constituting

cause for dismissal could easily be characterized as bad faith, “framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7. Thus we think the § 707(a) analysis is better conducted under the statutory standard, ‘for cause.’” *Id.* at 832.

Under this standard, the Court will evaluate Debtors’ current bankruptcy filing in light of their past conduct to determine whether cause exists to dismiss the instant petition. The records in this case indicate Debtors received notice of this hearing, but failed to attend. Nine of Debtors’ previous ten bankruptcy petitions were dismissed either on Debtors’ or the trustee’s motion, or due to their failure to pay filing fees, failure to make plan payments, or failure to attend the § 341(a) meeting of creditors. Moreover, on more than one occasion, only days elapsed between the dismissal of Debtors’ case and Debtors’ filing of a subsequent petition. In the petition now before the Court, Debtors have not yet paid the filing fee, nor have they corrected deficiencies in their schedules, even though instructed to do so by a previous order of this Court. Finally, Debtors failed to disclose the correct number of prior bankruptcy proceedings on their tenth petition and lied on the instant petition by disclosing only one bankruptcy filing during the last six years when the evidence clearly demonstrates multiple filings by Debtors during that period. “[A]ccuracy, honesty, and full disclosure are critical to the functioning of bankruptcy, and are inherent in the bargain for the discharge.” *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) (citation and internal quotations omitted). Debtors’ false statements regarding the number of previously filed cases are a serious matter, striking at the core of the bankruptcy process. *See In re Jones*, 289 B.R. 436, 438 n.2 (Bankr. M.D. Ala. 2003); *see also In re Soost*, 290 B.R. 116, 125 (Bankr. D. Minn. 2003) (noting that debtors have a personal, direct duty of truthfulness and candor with the court and must face “the consequences of material entries on bankruptcy statements and schedules that are false or contradictory . . .”).

Considering Debtors' sheer number of serial bankruptcy filings, the bases for their dismissal, the minimal time gap between dismissal and refiling in a number of Debtors' previous petitions, and Debtors' patently false statements on their instant and previous petition, the Court finds Debtors have engaged in a pattern of misconduct and gross abuse of the judicial process. The Court further finds that Debtors have not adequately prosecuted this case, that the instant petition constitutes the most recent manifestation of Debtors' pattern of abuse, and that, in light of the foregoing, there is cause to dismiss this case under § 707(a) and *Huckfeldt*.

II. Debtors Merit an Eight (8) Year Bar on Filing Bankruptcy Petitions

Separate from the dismissal is the U.S. Trustee's request that Debtors be permanently barred from filing under any chapter of the Bankruptcy Code, absent leave of Court. "[S]ection 349(a) empowers bankruptcy courts to enjoin future filings if cause exists to do so.⁷ In addition, section 105(a) permits a bankruptcy court to enter any Order necessary to carry out the provisions of the Code and to prevent an abuse of the bankruptcy process" *In re Rusher*, 283 B.R. 544, 547-48 (Bankr. W.D. Mo. 2002) (citations and footnote included). As the *Rusher* court found,

[s]ince serial filings can be an abuse of the bankruptcy process, and the abuse . . . cannot always be prevented by the injunction found in section 109(g), the majority of courts have held that Section 105(a) and 349(a) can be used conjunctively to enjoin a serial filer from filing yet another bankruptcy petition for a period of time in excess of 180 days.⁸

⁷ *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 335-36 (2d Cir. 1999).

⁸ See *Casse*, 198 F.3d at 337-38 (citing *In re Weaver*, 222 B.R. 521, 523 and n.1 (enjoining further bankruptcy filings for one year)); *In re Robertson*, 206 B.R. 826, 830 (Bankr. E.D. Va.1996) (holding that the debtor should be enjoined from filing another case for 417 days, the actual time the debtor unreasonably delayed creditors with the serial filings); *Norwalk Sav. Society v. Peia (In re Peia)*, 204 B.R. 310, 311, 315 (Bankr. D.Conn. 1996) (holding that a bankruptcy court may enjoin a

Id. at 548 (citations and footnote included). The Court takes this opportunity to align itself with the reasoning in *Rusher* and the cases cited therein.

In the instant case, the Court has found, as stated above, that Debtors' conduct and serial filings constitute gross abuse of the bankruptcy process. Given such extended abuse, the Court finds that, in order to protect the integrity of the bankruptcy system, Debtors must be barred from filing under any chapter of the Bankruptcy Code for a period significantly longer than 180 days. In similar situations, courts have imposed a permanent bar on abusive debtors, precluding them from refileing under any chapter of the Bankruptcy Code. *Compare In re Freeman*, 224 B.R. 376 (Bankr. S.D. Ohio 1998) (following six *pro se* petitions under Chapter 7, court permanently barred debtors from filing a bankruptcy petition, individually and/or jointly, anywhere in the United States, at any time in the future); *In re McCoy*, 237 B.R. 419, 422-23 (Bankr. S.D. Ohio 1999) (permanently barring debtor from refileing bankruptcy following eight filings under Chapters 7 or 13 over an eight year period); *In re Millers*, 90 B.R. 567, 568-69 (Bankr. S.D. Fla. 1988) (dismissing debtors' fifth bankruptcy case with permanent bar to refileing and finding, *inter alia*, that debtors attempted to perpetuate fraud in filing latest bankruptcy petition by altering their names and social security numbers and failing to list the prior bankruptcies filed by them). Under the facts in this case, Debtors' disregard for the entire bankruptcy process warrants extraordinary action. Although the Court has ample authority to bar Debtors from filing under the Bankruptcy Code permanently, the Court is not inclined to impose such a sweeping penalty at this point. However, since Debtors' abuse of the privileges offered to them under the Code began in 1995, Debtors shall be barred from access to those

debtor from filing another case for the length of time necessary to prevent an abuse of process).

privileges for a period of time equal to the duration of Debtors' abuse. Therefore, the Court will bar Debtors from filing a petition under any chapter of the Bankruptcy Code for no less than eight (8) years.⁹

Accordingly, for the reasons set forth herein, it is hereby

ORDERED that the U.S. Trustee's Motion to Dismiss is **GRANTED IN PART** in that this case is **DISMISSED** for cause under § 707(a) and § 349(a) and **DENIED IN PART** in that a permanent bar from refiling under any chapter of the Bankruptcy Code will not be imposed on Debtors Richard Balmer and Connie Balmer. It is also

ORDERED that the U.S. Trustee's oral request that Debtor Richard Balmer be barred from preparing bankruptcy petitions for other individuals is **DENIED**. It is also

ORDERED that Debtors Richard Balmer and Connie Balmer and any entity in which either has a controlling interest (including but not limited to Balmer's Cleaning Service, Lee Balmer, Momma & Papa's Cleaning Service, Momma & Papa's Game Room, Rick L. Balmer, Sparkle & Shine Cng, and The Cleaning Service) are barred from filing a petition, jointly and/or individually, under any chapter of the Bankruptcy Code for a period of **EIGHT (8) YEARS** from the date of entry of this Order.

⁹ Failure to comply with the terms of this Order could result in criminal sanctions. *See In re Webb*, No. 4:03-bk-15082, 2003 WL 21673684 (Bankr. E.D. Ark. July 8, 2003) (Court entered Order to Show Cause why Debtor should not be held in criminal contempt for the filing of her tenth (10th) bankruptcy petition in apparent violation of the Court's previous order prohibiting further bankruptcy filings by Debtor).

IT IS SO ORDERED.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: October 10, 2003

cc:

Richard & Connie Balmer, *pro se* debtors

James C. Luker, Trustee

U. S. Trustee